80-1408

No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether the Federal Communications Commission's refusal to reject a tariff is final and thus reviewable, where the rate increase effected by the tariff is not subject to investigation or refund either immediately or upon subsequent complaint by affected users.

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* Other respondents are: Aeronautical Radio, Inc.; Air Transport Association of America; American Broadcasting Companies, Inc.; American Newspaper Publishers Association; The Associated Press; CBS, Inc.; Commodity News Services, Inc.; Consolidated Rail Corporation; Dow Jones & Co., Inc.; General Electric Company; Microwave Communications, Inc.; National Broadcasting Company, Inc.; Southern Pacific Communications Company; United Press International, Inc.; and Western Union Telegraph Company.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (ARINC Pet. App. 1-53 [1]) and the order and opinion on rehearing (ARINC Pet. App. 54-62 and 63-66) are not yet officially reported. The opinion and order of the Federal Communications Commission (ARINC Pet. App. 67-78) is reported at 64 F.C.C. 2d 959.

JURISDICTION

The judgment of the court of appeals (ARINC Pet. App. 194-195) was initially entered on June 24, 1980, but was amended and as amended (App. D, *infra*) was entered on November 5, 1980. The United States' timely petition for rehearing and rehearing en banc was denied on January 27, 1981 (ARINC Pet. App. 197-198).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 402(a) of the Communications Act, 47 U.S.C. 402(a), provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under

[1] "ARINC Pet. App." refers to the appendix to the petition filed by Aeronautical Radio, Inc. and Air Transport Association of America in No. 80-1343.

this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

Section 2342 of Title 28 provides in pertinent part:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

STATEMENT

The Federal Communications Commission in 1968 began an investigation (Docket No. 18128) to consider the lawfulness of Telpak rates. Telpak is a bulk rate for private line telecommunications service offered by the American Telephone & Telegraph Company.[2] It is available in "packages" of 60 and 240 voice-grade channels and affords the United States and other large users significant savings over AT&T's other private line offerings (ARINC Pet. App. 5). The Commission subsequently enlarged the scope of this inquiry to include development of an appropriate cost-based methodology to determine the reasonableness of all AT&T private line rates. On October 1, 1976, the FCC released its opinion and an order, *AT&T, Revisions of Tariff FCC No. 260 (Telpak)*, 61 F.C.C. 2d 587 (1976) (ARINC Pet. App. 82-170). The Commission: (1) selected fully distributed cost

[2] Private line service offers customers "continuous communication between fixed points without the necessity of establishing a new circuit for each message" (ARINC Pet. App. 5).

("FDC") rather than long run incremental cost ("LRIC") as the general ratemaking methodology to be used by AT&T; (2) found that under the particular variation of FDC chosen, the evidence of record showed that Telpak was returning 12.6%, compared to AT&T's overall allowed rate of return of 8.5%; but (3) found nevertheless that Telpak rates were unfairly low (ARINC Pet. App. 113-144; 152-154). The FCC ordered Telpak abolished (*id.* at 163-164).

On March 23, 1977, AT&T filed Tariff Transmittal No. 12714, which provided for the termination of Telpak on June 8, 1977. The transmittal gave two reasons for abolition: the FCC's order and AT&T's unwillingness to have Telpak subject to the Commission's recently established rules on the shared use and resale of private line service (ARINC Pet. App. 9).[3] Although the transmittal recognized that Telpak's abolition would cost users approximately $100,000,000 annually, it provided none of the economic data which Section 61.38 of the Commission's Rules (ARINC Pet. App. 209-211) requires for tariff changes (*id.* at 9-10).

On June 13, 1977, the Commission issued an order reconsidering its October 1976 order. Reversing itself, the agency revoked its abolition order in respect of Telpak and directed further expedited hearings, should AT&T choose to keep Telpak in effect. *AT&T, Revisions of Tariff FCC No. 260 (Telpak)*, 64 F.C.C. 2d 971 (1977).

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[3] Those rules are set forth and explained in *Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C. 2d 261 (1976), 62 F.C.C. 2d 588 (1977), aff'd *sub nom. AT&T* v. *FCC*, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978).

On the same day, however, the Commission issued a separate order in which it declined to reject or to investigate Transmittal No. 12714 (ARINC Pet. App. 67-78). It held that 47 C.F.R. 61.38 did not apply to the transmittal because that provision covered only tariff revisions "changing rate levels or creating new rate structures," and not rate abolitions (*id.* at 74). Alternatively, the Commission held that it would waive sua sponte the requirements of Section 61.38 because AT&T had acted reasonably in not including the Section 61.38 data when it was under a Commission order to abolish Telpak (*id.* at 74).[4] The Commission also refused to investigate the rate increase because it found "no question of lawfulness to investigate" (*id.* at 75-76).

Several users of Telpak sought judicial review, and a stay pending review, of the Commission's refusal to reject or investigate Transmittal 12714. The United States, the largest user of Telpak,[5] argued as statutory respondent that the agency's action was arbitrary and capricious and joined the other users in seeking a stay. On July 21, 1977, the court of appeals (Bazelon and Wilkey, JJ.) ordered AT&T to continue offering Telpak to existing customers on existing terms pending review (App. E, *infra*). This injunction, never appealed to this Court by any party, has maintained the status quo pending judicial review. Cf. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 671 n.22 (1963).

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[4] The Commission also held that discontinuance of Telpak was not the discontinuance of a "service" within the meaning of Section 214 of the Act (*id.* at 72-73).

[5] The rate increase in 1977 would have cost the United States about $100 million a year. Today the extra cost to the taxpayers will be $120 million annually.

On June 24, 1980, the court of appeals unanimously ruled that the Commission had unlawfully refused to reject the Telpak termination tariff (ARINC Pet. App. 24-27). It held that 47 C.F.R. 61.38 applied to Transmittal No. 12714, since the effect of the transmittal was to impose a rate increase (*id.* at 25). It further held that Section 61.38 guaranteed important public rights to participate in ratemaking proceedings and concluded that the Commission had abused its discretion in waiving, sua sponte, the provision, in view of the importance of informed public comment on a rate increase of such magnitude (*id.* at 25-27).[6]

AT&T sought rehearing, claiming that the Commission's refusal to reject was unreviewable under *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), and *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235 (D.C. Cir.), cert. denied, No. 80-465 (Dec. 15, 1980).[7] The court of appeals on November 5, 1980, granted rehearing and reversed itself, holding that the agency's refusal to reject was unreviewable (ARINC Pet. App. 54-66). The court reiterated its "discontent" over the Commission's "unjustifiably summary" refusal to reject (*id.* at 65; 66). It again acknowl-

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[6] The court in a divided decision rejected the United States' argument that the Commission's choice of fully distributed cost pricing was inadequately explained (ARINC Pet. App. 12-17; 29-53). The court also ruled that Telpak's discontinuance was not within the ambit of Section 214 and that certain Commission rulings on particular AT&T rates and rate levels were erroneous (*id.* at 23-24, 18-21).

[7] The United States sought rehearing on the ratemaking methodology issue; this was denied on November 26, 1980. We do not seek review of that ruling here.

edged that 47 C.F.R. 61.38 was important to the public (*id.* at 61), and it recognized that Telpak users had virtually none of the protections available to customers in *Southern Railway* and *Papago* (*id.* at 66).[8] Nonetheless, the Court stated that because Telpak customers could file a complaint under Sections 206-209 of the Communications Act, 47 U.S.C. 206-209, against the single line rates which will govern once the Telpak bulk rate is abolished, the Commission's Telpak order must be deemed non-final and unreviewable (ARINC Pet. App. 61 n.34; 66).

The United States then sought rehearing of the court's ruling on reviewability. The court denied the petition on January 27, 1981 (ARINC Pet. App. 197-198).[9]

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[8] Thus the court stated (ARINC Pet. App. 66):

> Both these decisions, in which courts declined to review agency orders regarding acceptance of rate revisions, might be distinguished as involving agency procedures less summary than those employed by the FCC here. The *Papago* customers had the protection of (1) cost justification data, (2) suspension of the increased rates, (3) an ordered hearing on the merits of the rate increase, and (4) a refund order of the full overcharge if rate increases were found unlawful. *Papago*, slip op. at 10-11. In *Southern Railway*, although there was no suspension or ordered hearing, the customers had the protection of (1) cost justification data, (2) ICC orders requiring the Railroad to document the effects of the rate changes, and (3) agency monitoring of the Railroad's financial condition. 442 U.S. at 449-50. The AT&T customers had none of these protections.

[9] The court of appeals did, however, stay its mandate and continue the injunction pending the timely filing and disposition of a petition for certiorari (Apps. A, B, C, *infra*).

REASONS FOR GRANTING THE PETITION

This case presents the important question whether an agency's refusal to reject a tariff is judicially reviewable, where a substantial rate increase is allowed to take effect without the usual administrative scrutiny, is not scheduled for investigation, and is, as a practical matter, beyond subsequent challenge by affected users. In ruling against reviewability, the court below both misconstrued the governing law as set forth in this Court's decisions and deprived ratepayers of important protection under the Communications Act.

1. The power of an agency to reject a tariff is well established. *FPC* v. *Texaco*, 377 U.S. 33 (1964); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972). It is vitally important, for it protects ratepayers against tariffs that are invalid on their face—generally for failure to comply with major agency rules. Section 61.38 is that kind of rule. As the Commission explained in adopting the rule, it serves two important purposes: to insure that the Commission receives full data justifying proposed carrier rate changes; and to provide the public the meaningful opportunity to participate in ratemaking which Congress contemplated in Sections 203 and 204 of the Communications Act, 47 U.S.C. 203 and 204. *Amendment of Part 61*, 25 F.C.C. 2d 957, 959, 961, 965, 968 (1970). Considering the very substantial consequences involved, it is therefore extremely difficult to justify the Commission's waiver of that rule in the present case.[10]

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[10] The agency's waiver of its rule in this case is very different from that sustained in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), where the regu-

In our view, the court of appeals rightly described this conduct as lawless (ARINC Pet. App. 25-27, 66).

In the circumstances, it seems clear that the Commission's refusal to reject the Telpak termination tariff was final and reviewable. It has never been doubted that an agency's refusal to reject a tariff is sometimes reviewable. *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971); *Municipal Light Boards* v. *FPC*, *supra*; *IBM* v. *FCC*, 570 F.2d 452 (2d Cir. 1978); cf. *Papago Tribal Utility Authority* v. *FERC*, 628 F.2d 235, 238 n.8 (D.C. Cir.), cert. denied, No. 80-465 (Dec. 15, 1980).[11] As we understand it, this Court's decision in *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), confirms that principle. In *Southern Railway* the Court held that an agency decision not to investi-

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lated firm submitted evidence which, though not as complete as the rule contemplated, still enabled the public to make "precise and informed objections." *Id.* at 538. In this case the Commission required no information at all.

[11] Thus in *Associated Press* v. *FCC*, *supra*, 448 F.2d at 1103, the court stated (footnote omitted):

> We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulation or order * * *. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts.

In *Papago Tribal Utility Authority* v. *FERC*, *supra*, where the agency both investigated and provided for refunds, the court cut back on the scope of reviewability, but it was careful to note (628 F.2d at 238 n.8):

> We are not concerned in this case with orders that accept tariff filings and allow them to take effect without investigation or refund obligation. Such orders would present different questions of reviewability.

gate a rate increase was not final and thus not reviewable, because the new tariff would be subject to the mandatory investigatory provisions contained in the Interstate Commerce Act's complaint procedure, Section 13(1) (49 U.S.C. 13(1)).[12] The availability of the complaint provisions both counseled against premature involvement in the agency's assessment of the new rates and offered ratepayers a fair and meaningful chance for relief. 442 U.S. at 456-460. But were relief not available to ratepayers by complaint against the increased rates, the refusal to investigate would, as a practical matter, be the end of agency inquiry and reviewable at once. *Id.* at 452-454.

This is such a case. The Commission's refusal to reject or investigate the massive rate increase is practically final, because Telpak customers can not complain against the rate increase. Rather than raise Telpak rates $100 million a year and subject the higher bulk rates to scrutiny upon complaint of the ratepayers, AT&T carefully crafted its rate increase as an abolition of the bulk rate. There are no increased bulk rates against which to complain. The only matter open to the former Telpak ratepayers is a challenge to the pre-existing single line rates they will be forced to pay. But these are different rates, designed for different users.[13] Indeed, the Commis-

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[12] Title II of the Communications Act, under which this case arises, is patterned after the Interstate Commerce Act, the statute involved in *Southern Railway Co.* See *Essential Communications Systems* v. *AT&T*, 610 F.2d 1114 (3d Cir. 1979). Sections 206-209 of the Communications Act parallel Section 13(1) of the Interstate Commerce Act.

[13] The ratepayers' dilemma can be usefully compared to a familiar situation in a related context. The Postal Service has a bulk mail rate which is lower than its regular first class rate. The discount may be reasonable if the costs of

sion has stated that Telpak's termination has "no relevance" to the reasonableness of single line rates, that its ongoing investigation of single line rates in Docket No. 20814 will not be expanded to cover bulk rates or quantity discounts, and that it will consider only whether the revenue produced by the single line rates exceeds that authorized by the Commission and whether the single line rate structure violates the Act. See *AT&T, Revisions to Tariff Nos. 258 and 260*, 64 F.C.C. 2d 959 (1977). Cf. *AT&T, Charges for Private Line Services*, 67 F.C.C. 2d 693 (1978) (listing issues to be examined).

The Commission accordingly did not seriously dispute that resort to a complaint against single line rates under Sections 206-209 would be futile for Telpak customers. Instead, it argued that these ratepayers could resort to other remedies, such as filing a petition under Section 201(b) of the Act, 47 U.S.C. 201(b), for a proceeding to establish special government rates. FCC [redacted] Opposition To U.S. Petition For Rehearing (filed Dec. 22, 1980), at 6-7. But such a Section 201(b) proceeding (which would be unavailable to all Telpak users except the United States) would be an entirely new proceeding. It would be available even after the conclusion of a Commission rate investigation under Section 204, or Sections 206-209. Indeed, on the Commission's rationale, no decision would ever be final. That argument is flatly contrary both to *Southern Railway Co.* (442 U.S. at 452)

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handling bulk mail are less than those of handling regular first class. But if the Postal Service were to withdraw the bulk rate, users confronted with a major increase in the cost of mailing in bulk would be forced to undertake the task, both difficult and irrelevant to the increase in costs for bulk mailing, of attacking the reasonableness of the general first class rate.

and this Court's repeated holdings that finality is a practical concept. *Columbia Broadcasting Systems* v. *United States*, 316 U.S. 407 (1942); *FTC* v. *Standard Oil Co.*, No. 79-900 (Dec. 15, 1980).

2. At all events, the decision of the court of appeals presents a question of recurring importance meriting review by this Court. The significance of the case is not limited to the $120 million a year which the AT&T rate increase will cost the taxpayers. Congress enacted Title II of the Communications Act, like the Interstate Commerce Act, to protect ratepayers against the power of carriers. Cf. *Keogh* v. *Chicago & Northwestern Ry.*, 260 U.S. 156 (1922). The decision below threatens a major breach in the protection which Congress has designed. Carriers are now invited to raise rates without public scrutiny, so long as they put those increases in the form of elimination of a tariff offering. Thus, should AT&T wish to increase greatly the rates for its WATS offering,[14] it could effect a massive increase by abolishing WATS as it abolished Telpak. If the Commission's refusal to reject or investigate, no matter how unlawful, escapes judicial review, ratepayers may be subject to hundreds of millions of dollars of higher costs without justification. Moreover, since there are cognate provisions in other statutes—ranging from regulation of surface transportation to electric power[15]—the effect of the decision below may well go beyond the communications industry.

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[14] WATS, or Wide Area Telecommunications Service, enables subscribers to make large numbers of long distance calls at flat or combination rates which offer large users big savings over ordinary long distance. See *AT&T (Long Lines Department)*, 79 F.C.C. 2d 10 (1980).

[15] See, *e.g.*, the Interstate Commerce Act, 49 U.S.C. (Supp. III) 11701, and the Federal Power Act, 16 U.S.C. 825e.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 77-1333

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENTS

And Consolidated Case Nos. 77-1521,
77-1544, and 78-1368

[Filed Feb. 11, 1981]

NOTICE TO COUNSEL

On February 9, 1981 this Court issued an order granting, in part, a motion by respondent United States under Rule 41(b), Federal Rules of Appellate Procedure, for further stay of the issuance of the mandate in these cases. That same order also provided that the mandate, unless stayed further, shall issue at 12 o'clock noon on February 21, 1981.

In response to an inquiry, I have been authorized by the Court to state that issuance of the mandate will be stayed further, in accordance with Rule 41(b), Federal Rules of Appellate Procedure, pending final

disposition by the Supreme Court of the United States, should any party to these proceedings file a petition for writ of certiorari, provided that a notice evidencing such filing, issued by the Clerk of the Supreme Court, is received in the office of the Clerk of this Court by 12 o'clock noon on February 21, 1981.

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 77-1333

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

And Consolidated Case Nos. 77-1521, 77-1544, and 78-1368

[Filed Feb. 9, 1981]

Before: Bazelon, Senior Circuit Judge; Robb and Wilkey, Circuit Judges

ORDER

Upon consideration of respondent's (federal) motion for further stay of mandate, and of the various responses and replies filed in connection therewith, it is

ORDERED, by the Court, that respondent's aforesaid motion is granted, in part, and the Clerk is di-

rected to issue the mandate herein at 12:00 noon on February 21, 1981.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 77-1333

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING CO., INC., ET AL., AMERICAN TELEPHONE AND TELEGRAPH CO., MICROWAVE COMMUNICATIONS, INC., WESTERN UNION TELEGRAPH COMPANY, INTERVENORS

And Consolidated Case Nos. 77-1521, 77-1544, and 78-1368

[Filed Jan. 21, 1981]

Before: Bazelon, Senior Circuit Judge; Robb and Wilkey, Circuit Judges

ORDER

Upon consideration of the various motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, of the responses thereto, and replies to said responses, and upon consideration of the motion of American Telephone and Telegraph Co. for an order terminating the injunc-

tion entered by this Court on July 21, 1977, of the responses thereto, and the reply to said responses, and upon consideration of the requests of various petitioners for clarification of injunction, and upon consideration of the various supplemental pleadings, and it appearing that by order filed November 26, 1980, this Court has directed the Clerk not to issue the mandate for a period of seven (7) days after disposition of all pending petitions for rehearing and suggestions for rehearing *en banc*, it is

ORDERED, by the Court, that all motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellant Procedure, are denied and the Clerk is directed to issue the mandate at 12:00 noon on the eighth calendar day following disposition of the pending petition for rehearing and suggestion for rehearing *en banc*, filed by the United States of America. The injunction issued earlier on July 21, 1977 shall be continued in full force and effect until the issuance of the mandate, at which time, absent a contrary directive from this Court, the injunction shall be automatically terminated.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

No. 77-1333

AERONAUTICAL RADIO, INC., ET AL., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COS., INC., ET AL.
AMERICAN TELEPHONE AND TELEGRAPH CO.
MICROWAVE COMMUNICATIONS, INC.
WESTERN UNION TELEGRAPH COMPANY,
INTERVENORS

No. 77-1521

AERONAUTICAL RADIO, INC., AND
AIR TRANSPORT ASSOCIATION OF AMERICA,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
CONSOLIDATED RAIL CORPORATION
MICROWAVE COMMUNICATIONS, INC AND
MCI TELECOMMUNICATIONS CORP.
AMERICAN NEWSPAPER PUBLISHERS, ET AL.,
INTERVENORS

No. 77-1544

GENERAL ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY MICROWAVE COMMUNICATIONS, INC., ET AL., INTERVENORS

No. 78-1368

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANY, INC. & CBS, INC., & NATIONAL BROADCASTING COMPANY, INC. DOW JONES & CO., INC., INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

Filed Nov. 5, 1980

Before: BAZELON, Senior Circuit Judge, ROBB and WILKEY, Circuit Judges

AMENDED JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Communications Commission and were argued by counsel. On con-

sideration of the foregoing, of the petition for rehearing and supplement thereto filed by petitioner-intervenor American Telephone and Telegraph Company, and the Court having entered an order granting rehearing, it is

ORDERED, by the Court, that the judgment of this Court filed herein on June 24, 1980 is hereby amended to bring it into conformity with this Amended Judgment, and it is

FURTHER ORDERED, and ADJUDGED, by the Court, that the petitions for review of orders of the Federal Communications Commission under review are dismissed, all in accordance with the opinions of this Court filed herein on June 24 and November 5, 1980, respectively.

Per Curiam

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 5, 1980

Opinions for the Court filed by Circuit Judge Robb

Opinion filed by Circuit Judge Wilkey on June 24, 1980, dissenting in part from opinion for the Court filed on that date.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976

No. 77-1251

MICROWAVE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC., INTERVENORS

No. 77-1318

THE WESTERN UNION TELEGRAPH COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

No. 77-1322

AMERICAN NEWPAPER PUBLISHERS ASSOCIATION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, ET AL., INTERVENORS

No. 77-1333

AERONAUTICAL RADIO, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COS., INC., ET AL., INTERVENORS

No. 77-1521

AERONAUTICAL RADIO, INC., AND AIR TRANSPORT ASSOCIATION OF AMERICA, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., INTERVENORS

No. 77-1544

GENERAL ELECTRIC COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL., INTERVENORS

[Filed Jul. 21, 1977]

Before: Bazelon, Chief Judge, and Wilkey, Circuit Judge

ORDER

This matter is before the Court on the following: the motion of Aeronautical Radio, Inc. and Air Transport Association of America for partial stay pending judicial review, the motion of the United States of America for partial stay pending review and for expedited consideration, the motions of Aeronautical Radio, Inc., and Air Transport Association of America for temporary injunction and for mandatory injunction, the motion of the United States for stay, the motions of the General Electric Company for a temporary injunction and for injunction, the motion of the United States for expedited consideration of its motion for stay or, in the alternative, for summary reversal, the motion to assign consideration of Aeronautical Radio, Inc. and Air Transport Association of America motions for mandatory and temporary injunction to a particular division of the Court, and of the responses to the foregoing it is

ORDERED by the Court that the motion of Aeronautical Radio, Inc. and Air Transport Association of America for partial stay pending judicial review and the motion of the United States of America for partial stay pending review and for expedited consideration, are dismissed as moot, and it is

FURTHER ORDERED by the Court that the motion to assign consideration of Aeronautical Radio, Inc. and Air Transport Association of America motions for mandatory and temporary injunction to a particular division of the Court is denied, and it is

FURTHER ORDERED by the Court that the motions of Aeronautical Radio, Inc., and Air Transport Association of America for temporary injunction and

for injunction, and the motion of the United States for stay, the motions of the General Electric Company for a temporary injunction and for injunction, and the motion of the United States for expedited consideration of its motion for stay or in the alternative, for summary reversal, are denied, and on consideration of these motions, it is

FURTHER ORDERED by the Court, *sua sponte*, that the American Telephone and Telegraph Company is enjoined from discontinuing the Telpak offering to customers served and under the terms and conditions existing as of the date of this order pending review of the Federal Communications Commission's *Memorandum Opinion and Order In The Matter of American Telephone and Telegraph Company, Long Lines Department* (Transmittal No. 12714) FCC 77-384 (adopted June 2, 1977, reconsideration denied June 16, 1977).

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

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CLERK

No. 80-1408

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED STATES OF AMERICA, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

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REPLY MEMORANDUM FOR THE PETITIONER

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1. The court of appeals' decision not to review the Commission's refusal to reject AT&T's Telpak termination tariff rested squarely and solely on its judgment that Telpak users could obtain "realistic" relief from AT&T's massive bulk rate increase by filing complaints against the remaining single-channel rates (ARINC Pet. App. 61 n.34). That view, however, is completely mistaken. The complaint of Telpak customers is that the carrier has massively increased bulk rates. With respect to this particular increase, the lawfulness of the distinct and different single-channel rates has, in the Commission's own words, "no relevance" (ARNIC Pet. App. 75).[1]

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[1]Contrary to AT&T's contention (Br. in Opp. 16 n.16), the futile complaint remedy against single-channel rates is analogous to a complaint against the 18-cent first-class postal rate by bulk mailers whose rates were to be greatly increased by abolition of lower bulk rates. See

The Commission and AT&T do not disagree, but instead offer justifications for the court of appeals' decision not given by the court itself. The Commission argues that its action is unreviewable because Telpak customers might ask it to establish a quantity discount (FCC Br. in Opp. 14 n.27). This is to counsel the initiation of a wholly new proceeding, which conflicts with the rationale of *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979). An agency's refusal to investigate a proposed rate increase is final and reviewable if an aggrieved customer cannot obtain meaningful relief by filing a subsequent complaint against that increase. *Id.* at 452-454.

AT&T does not even offer the cold comfort of a wholly new proceeding. Indeed, it contradicts the Commission and asserts that if single-channel rates are lawful, "that is all to which the Telpak users are entitled" (AT&T Br. in Opp. 14)—even if bulk rates would also be just and reasonable. This disagreement with the Commission shows that the case not only involves a misapplication of *Southern Railway* but also implicates the very power of a regulatory commission to prescribe a bulk rate over the objections of a carrier.

2. Respondents suggest that the Commission's refusal to apply 47 C.F.R. 61.38 was lawful. They also assert that, even if improper, it is not a ground for judicial review (FCC Br. in Opp. 13; AT&T Br. in Opp. 12). These contentions are again mistaken and again abandon the reasoning of the court of appeals. The court had no doubt that the Commission acted improperly in waiving its rule. It rightly said so in both of its opinions (ARINC Pet. App. 25-27, 66), for the Commission allowed AT&T to implement a massive bulk rate increase without providing any of the justifying data

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Pet. 9-10 n.13. The inadequacy of complaint relief is a fundamental problem for bulk users apart from the ratemaking question of whether the costs of providing bulk service are lower.

required by the Rules (*id.* at 25-27). The fact that the Commission, in another proceeding, had generated information about some single-channel rates (FCC Br. in Opp. 6 n.9; AT&T Br. in Opp. 12) is irrelevant. The Rules obliged AT&T to document its huge bulk rate increase, and that it never did.

Although the court of appeals ultimately concluded that the Commission's violations of its Rules provided no occasion for judicial review, it did so because of its belief that the complaint remedy eliminated the risk of substantial prejudice to Telpak users (ARINC Pet. App. 62). Since, however, there is exactly such a risk because of the futility of the complaint procedure, respondents abandon the court of appeals' rationale and argue instead that Rule 61.38 can confer no rights on users because it is solely for the Commission's benefit (FCC Br. in Opp. 13; AT&T Br. in Opp. 12). This contention flies in the face of the recognized importance under the Communications Act of informed public comment regarding rate increases. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538 (1970); *Amendment of Parts 0, 1, and 61*, 62 F.C.C. 2d 474, 476 (1976); *Amendment of Part 61*, 25 F.C.C. 2d 957, 968, 970-971 (1970).

3. Finally, AT&T argues that, seventeen years ago, the Commission ruled that Telpak and single-channel services have the same cost characteristics so that no bulk rate could be cost-justified (AT&T Br. in Opp. 15-16). Suffice it to say that the Commission itself makes no such claim and that, before the Commission, AT&T consistently contended that Telpak was compensatory, submitting evidence showing that Telpak had a higher rate of return than AT&T's other private line services (ARINC Pet. App. 154).

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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